

OPEN RECORDS AND MEETINGS OPINION
2001-O-06

DATE ISSUED: June 18, 2001

ISSUED TO: Norbert Sickler, Administrator, Southwest Multi-County Correction Center

CITIZEN'S REQUEST FOR OPINION

On May 31, 2001, this office received a request for an opinion under N.D.C.C. § 44-04-21.1 from Richard Volesky on behalf of The Dickinson Press asking whether the administrator of the Southwest Multi-County Correction Center violated N.D.C.C. § 44-04-18 by failing to provide a sufficient copy of an open record.

FACTS PRESENTED

On May 23, 2001, a reporter for The Dickinson Press made a verbal request for copies of three color pictures regarding a juvenile who died at the Southwest Multi-County Correction Center (SWMCCC).¹ The administrator of SWMCCC initially denied the reporter's request. The reporter responded by faxing a written request for "color print copies" of the three pictures rather than "photocopies." Mr. Norbert Sickler, the administrator, mailed a black and white photocopy of the requested pictures to the reporter later that day.

The next day, May 24, Mr. Sickler mailed a supplemental explanation to the reporter indicating his belief that providing the photocopy complied with N.D.C.C. § 44-04-18. He further expressed his view that making color reproductions of the requested pictures was not required and could "set precedent for a practice which could result in inappropriate expenditure of public funds." The reporter responded by faxing a letter disagreeing with Mr. Sickler's response and pointing out that The Dickinson Press is responsible for all costs of duplication.

Copies of most of the correspondence described above were provided to the Office of Attorney General and the attorney for SWMCCC. On May 31, Mr. Sickler mailed a letter to the reporter indicating SWMCCC would take the pictures to a local business to make color

¹ The effort of The Dickinson Press to obtain records from the SWMCCC about the deceased juvenile has been addressed by this office in two previous opinions. See 2000 N.D. Op. Att'y Gen. F-09, 2000 N.D. Op. Att'y Gen. O-13.

reproductions of the requested pictures upon payment of the estimated duplication costs. In the alternative, the reporter was invited to return to the SWMCCC with his own equipment to make the copies. Color reproductions of the pictures were subsequently provided to the reporter but the request for this opinion has not been withdrawn.

ISSUE

Whether SWMCCC complied with N.D.C.C. § 44-04-18 when it responded to a request for "color print copies" of three color pictures by providing a black and white photocopy of those pictures.

ANALYSIS

The duty of state and local government officials in North Dakota to make copies of open public records upon request had been implied for several years by the Office of Attorney General and has been expressly required under the open records law since 1993. See 1993 N.D. Sess. Laws ch. 441, § 1; 1989 N.D. Op. Att'y Gen. F-7; Letter from Attorney General Robert Wefald to Duane Liffbrig (Dec. 19, 1983).

Upon request for a copy of specific public records, any entity subject to subsection 1 shall furnish the requester one copy of the public records requested. A request need not be made in person or in writing, and the copy must be mailed upon request. The entity may charge a reasonable fee for making or mailing the copy, or both. An entity may require payment before making or mailing the copy, or both. If the entity is not authorized to use the fees to cover the cost of providing or mailing the copy, or both, or if a copy machine is not readily available, the entity may make arrangements for the copy to be provided or mailed, or both, by another entity, public or private, and the requester shall pay the fee to that other entity. As used in this subsection, "reasonable fee" means the actual cost to the public entity of making or mailing a copy of a record, or both, including labor, materials, postage, and equipment, but excluding any cost associated with excising confidential or closed material under section 44-04-18.8. An entity may impose a fee not exceeding twenty-five dollars per hour per request, excluding the initial hour, for locating records if locating the records requires more than one hour. This subsection does not apply to copies of public records for which a different fee is specifically provided by law.

N.D.C.C. § 44-04-18(2). The word "copy" as used in this subsection is not defined. The legislative history of the 1993 amendment, enacted as 1993 House Bill 1497, is silent on the meaning of "copy." Therefore, the word "copy" as used in N.D.C.C. § 44-04-18(2) must be given its plain and ordinary meaning. N.D.C.C. § 1-02-02.

The plain meaning of "copy" is "[a]n imitation or reproduction of something original; duplicate." The American Heritage Dictionary 322 (2d coll. ed. 1991). "Duplicate" is defined as "[a]n identical copy; facsimile" or "[s]omething that corresponds exactly to something else, esp. an original." Id. at 430.

When an original record is a black and white written document, the meaning of "copy" under N.D.C.C. § 44-04-18(2) is clear and simply requires a photocopy. However, the definition of "record" as used in the open records law is not limited to black and white documents and includes other forms of recorded information such as computer files, videotapes, audiotapes, photographs, and color documents. See N.D.C.C. § 44-04-17.1(15). For these additional types of records, a photocopy would not be a duplicate or exact reproduction of the original record. Rather, other means must be used to reproduce the original record. But see N.D.C.C. § 44-04-18(3) (release of a computer file is not required if "no means exist to separate or prevent the disclosure of any closed or confidential information contained in that file.").

The reporter in this case specifically asked for "color print copies" rather than photocopies. The reporter also indicated he was prepared to pay SWMCCC's actual cost of providing a color reproduction of the records. Since payment of the fee is required under N.D.C.C. § 44-04-18(2), providing an exact reproduction of the pictures would not "result in [an] inappropriate expenditure of public funds" as suggested by SWMCCC.

In this case, the original records were three small color pictures. The initial response of SWMCCC consisted of a single page containing a black and white image of all three pictures. The record provided by SWMCCC was on regular 8.5 by 11 inch paper, lacked the color of the original, and was of considerably poorer resolution. Had the reporter simply asked for a photocopy of the pictures, SWMCCC would have been under no duty to provide a color reproduction and would not have been allowed to charge the additional cost of obtaining and providing a color reproduction.²

² The reporter also asked for a reproduction that was of a different size than the original. While SWMCCC is not specifically required to reproduce the pictures in a different size than the original, it seems there is no reason why SWMCCC ought not do so, particularly since reproducing a picture in a different size is easy to do and the reporter was prepared to pay all costs of obtaining the requested reproduction.

It is my opinion that the black and white photocopy provided by SWMCCC, while in a sense a "copy," was not a duplicate or exact reproduction as required by N.D.C.C. § 44-04-18(2).

CONCLUSION

SWMCCC violated N.D.C.C. § 44-04-18 by failing to provide upon request an exact reproduction of a color picture which is open to the public under N.D.C.C. § 44-04-18. Providing a black and white photocopy of a color picture does not meet the statutory requirement that a "copy" be provided upon request.

STEPS NEEDED TO REMEDY VIOLATION

Duplicate color pictures have now been provided to the reporter, so no further remedial action is necessary.

Wayne Stenehjem
Attorney General

Assisted by: James C. Fleming
Assistant Attorney General